SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 639

PRICE BROTHERS COMPANY,
Petitioner and Appellee Below,

vs.

FRANK SMITH,
Respondent and Appellant Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

I.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals is found at page 218 of the record and reported in

The opinion of the District Court is found on page 176 of the record.

II.

Jurisdiction of This Court.

The date of the judgment to be reviewed is December 1, 1942 (R. 217).

The statutory provision which is believed to sustain the jurisdiction of this court is

28 U. S. C. A., Sec. 347.

III.

Statement of the Case.

We have heretofore recited in our petition all the facts essential to a determination of the law applicable.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in not affirming the judgment of the District Court.

3. The Circuit Court of Appeals erred in not holding, upon the undisputed facts disclosed by the evidence, that respondent had estopped himself from prosecuting this action.

4. The Circuit Court of Appeals erred in holding that the question of whether or not respondent had estopped himself was a question of fact for the jury.

V.

Summary of Argument.

The respondent, by accepting workmen's compensation from the Industrial Commission of Ohio, has estopped himself from maintaining this action.

We realize that every favorable intendment must be accorded respondent's state of the evidence. Therefore,

we start from the point that respondent, at the time of his application for Workmen's Compensation from the Industrial Commission of Ohio, did not know that he was applying for it upon the basis that he was an employee of petitioner. However, on October 8, 1940, respondent's attorneys, who had been selected and chosen by him to prosecute this action and in whom he was entrusting his case, learned that the signed application of respondent to the Industrial Commission of Ohio asserted that the respondent was an employee of petitioner at the time of the happening of the accident, and their receipt (Def's. Ex. C; R. 192) very clearly shows that they were inspecting his file for the purpose of determining his status. Having obtained this information, they, nevertheless, on February 15, 1941, filed the amended complaint against petitioner seeking to recover damages from it upon the basis that respondent was not its employee but an independent contractor. In the meantime, respondent continued to accept his compensation payments.

The question at once arises as to the legal effect of this knowledge so gained by respondent's attorneys. Was it communicated to him? Should it have been? Was there any legitimate reason why it should not have been? Respondent simply says that it was not. Should respondent and his attorneys be permitted to now take such a position?

Both Federal and State courts have unanimously held that what an attorney learns in the course of the prosecution of his client's claim or business, is imputed and chargeable to the client. Any other rule would permit litigants to perpetrate untold fraud and litigate with reckless abandon. An attorney and his client, just as any other agent and principal, and regarded as a unit, and, except in those cases where an attorney seeks to defraud his client or has obtained information of such a character that it would be a breach of ethics to communicate it to him, the law indulges

a conclusive presumption that that which an attorney learns is chargeable to his client.

This court, in the case of *Smith et al.* v. *Ayer et al.*, 101 U. S., 320, 25 L. Ed. 955, in dealing with this question, held as follows in the first syllabus:

> "Information to an attorney is information to his client, and the latter is affected with notice of all facts, which notice can be charged upon his attorney."

And again in the case of *Rogers* v. *Palmer,* 102 U. S. 263, 26 L. Ed. 164, this court held as follows in the first syllabus:

> "On the question whether the plaintiff in a judgment on which goods were taken in execution, knew of the defendant's insolvency and of the intent to evade the bankrupt law, the knowledge of plaintiff's attorney is the knowledge of plaintiff."

In the case of *The American Export & Inland Coal Corp.* v. *The Matthey Addy Co.,* 112 O. S. 186, the Supreme Court of Ohio used the following language in the second syllabus:

> "The general rule that notice to an agent is notice to his principal applies to the relation of attorney and client, and an attorney's notice or knowledge of facts affecting the rights of his client will be considered notice to the latter."

The following text is found in 5 Amer. Juris., p. 302:

> "The well established general rule that notice or knowledge of an agent, while the agency exists and while he is acting within the scope of his authority, is imputed to his principal, is applicable to the relation of attorney and client; notice to the attorney is notice to his client, at least where the attorney receives such notice in the course of the transaction in which he is acting for his client, and where it comes in such a manner that he may communicate it to the client or act upon it without any violation of a duty. The test is whether

the information is of a character which it is the duty of the attorney to communicate."

Thus it is at once apparent that the knowledge of respondent's attorneys, gained by them from their examination of his file before the Industrial Commission, must be imputed to respondent.

In addition to this, the evidence discloses that the respondent knew on October 25, 1941, that he had been receiving compensation on the theory that he was an employee of petitioner. Yet between then and the time of the trial, on December 1, 1941, neither he nor his attorneys made any effort whatever to withdraw his application for Workmen's Compensation and he continued to hold himself eligible for payments.

We, therefore, proceed to the next proposition applicable; namely, what legal effect does respondent's acceptance of compensation on the basis that he was an employee of petitioner have on his right to prosecute this action?

It is a matter of logic that one cannot be an employee of another and at the same time be, with respect to that other, an independent contractor. Respondent has discarded this rule of logic and this fundamental rule of fair play. For the purpose of obtaining all of the benefits accruing to him under the Workmen's Compensation Act, he is an employee of petitioner. For the purpose of this action he is not an employee, but an independent contractor. What an utter disregard of the sanctity of courts! He claims that at the time he signed the application for Workmen's Compensation he was in such pain and under the influence of narcotics to such an extent that he did not realize what he was doing, and therefore his application was void and the Industrial Commission was clothed with no jurisdiction or authority whatever. Even conceding this to be true, he later learned otherwise. We do not urge estoppel because he signed this

application. We are urging estoppel because he has accepted its benefits. A man who does not speak when he should, may not speak when he would. Regardless of whether or not the Industrial Commission of Ohio was clothed with jurisdiction pursuant to his application for compensation, he is now estopped from questioning that jurisdiction. No person should be permitted to travel two such inconsistent roads at the same time.

The Supreme Court of Ohio has laid down a clear cut rule regarding such action, and indeed we might say it is consistent with every rule of the proper administration of justice. In the case of *Conrad, Admrx.* v. *Coal Co.*, 107 O. S. 387, the facts were as follows:

Plaintiff's decedent was killed while in the employ of defendant. An application for Workmen's Compensation was filed by plaintiff with the Industrial Commission of Ohio, who found that the decedent was killed after his day's work was over and therefore she was entitled to no compensation. Thereafter she sued her decedent's employer, who urged that she had made an election of remedies and was estopped from prosecuting an action against it based on negligence.

The Supreme Court in dismissing defendant's claim of election of remedies adopted the syllabus in the case of *Water, Light & Gas Co.* v. *Hutchinson*, 160 Fed. 41. That syllabus reads as follows:

> "The fact that a party through mistake attempts to exercise a right to which he is not entitled or has made choice of a supposed remedy which never existed and pursued it until the court adjudged that it never existed, does not preclude him from afterwards pursuing a remedy for relief to which in law and good conscience he is entitled."

Upon the question of estoppel, the court uses the following language, on page 393:

"Since we have decided that there was no statutory waiver, was the applicant concluded by an estoppel of record evidenced by the finding of the Commission against her?

"According to the allegations of the reply, the Commission found that at the time of injury Conrad was not in the employ of defendant, nor injured in the course of employment. Had the finding of the Commission been in her favor, or had she accepted compensation under the act, an estoppel would arise, since she could not thereafter consistently sue on the theory that the deceased was not covered by the act. One cannot pocket the fruits of the act and later disclaim it."

This, we respectfully urge, is exactly the respondent's position in the case at bar. He has pocketed the fruits of the Workmen's Compensation Act, which was not only enacted for his protection but for his employer's protection as well; and still retaining its benefits, he seeks the benefits of this wholly inconsistent remedy.

In the case of *Industrial Commission* v. *Broskey,* 128 O. S., 372, the same principle was again enunciated. The facts were as follows:

Broskey was a bus driver for an Ohio corporation which operated a bus service from Canton, Ohio, to Pittsburgh, Pennsylvania. While returning from Pittsburgh, Broskey's bus left the highway and he was injured. Broskey's employer was a contributor to the Workmen's Compensation fund, and he filed an application for Workmen's Compensation and accepted payments. Shortly after, he filed suit against his employer for damages for the same injuries. Upon learning of this, the Commission stopped further payments to him pending the outcome of the action. His employer set up, among other defenses, an application for and an acceptance of Workmen's Compensation. The case

was not tried, but was settled by his employer by the payment of $6500.00.

Thereafter Broskey pursued his claim against the Industrial Commission. The court, in its opinion, made the following observations: (pp. 381-386)

> "The election or selection of a forum is of little consequence only in so far as it affects the doctrine of estoppel. Unless Broskey's recovery from his employer in an action at law took away his right to proceed against the Industrial Commission for compensation, and unless the law weaves the facts in this case into the woof of non-liability, then Broskey's recovery from his employer amounts to just so much piffle, so far as this case is concerned, provided, of course, that Broskey under all the other attendant facts and circumstances is entitled to participate in the Workmen's Compensation Fund.
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> "Leaving out of consideration the question as to the extra territorial jurisdiction of the Industrial Commission of Ohio and the interstate commerce phase of the case, can an employee, after having sued and recovered from an employer who was a contributor to the State Insurance Fund an amount satisfactory to him as damages for his injury on the theory that his case was not compensable, afterward be permitted to participate in the State Insurance Fund on account of the same identical injury?
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> "If such contention could be maintained, is it not time to remove the blindfold from the eyes of the goddess that lawyers worship, so that she can see what is the matter with her scales?
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> "Broskey should have everything to which 'in law and good conscience he is entitled.' That is the proposition exactly. Broskey has it. He is now seeking that to which 'in law and good conscience' he is not entitled. If Broskey discovered his error of law before settlement, he should have dismissed his action at his own

cost in 'good conscience'; and if he discovered it afterward, he should have returned to his employer 'in good conscience' the sum of $6500, which his employer paid him by way of settlement, apparently in 'good conscience.' If good conscience is a part of the criteria in an action at law, then both parties should follow it.

"We are not denying Broskey his right to recover in this action for pursuing the $6500, but for getting it.

* * * * * * *

"The Industrial Commission is the administrator of the State Insurance Fund. It stands between the employer and the employee and is the handmaiden to both. Its primary duty is to see that each is accorded fair treatment by the other. If an employee sues an employer who is a contributor to the State Insurance Fund, and such employer does not see fit to set up such fact and stand upon it as a bar to the action, and instead settles with the employee for a substantial amount satisfactory to the employee, then it becomes the duty of the Industrial Commission, if such employee subsequently sues it for compensation, to plead the fact that such employee has been compensated by his employer. The Industrial Commission owes it to such employer not to take any more of his money to pay an employee whom he has fully paid. The Industrial Commission owes it to all employers to see to it that they shall not be required to pay compensation twice, and it owes it to the employees to see to it that no employee shall be compensated twice, to the end that the fund will be able to respond to the demands of future claimants who have not been compensated by their employers for their injuries. When Broskey settled with his employer in this case, the employer went out of the picture, and the Industrial Commission, its handmaiden, went with it."

We say that in the case at bar, when respondent continued to accept Workmen's Compensation, both before and after

the filing of this action, the petitioner, so far as he was concerned, went out of the picture.

As stated by the Supreme Court of Ohio, the petitioner, as a contributor to the Workmen's Compensation Fund, is interested in payments made to injured employees. After all, it is the money of employers which goes to make up this fund, and respondent in retaining the benefits of his award was being paid money which, in turn, had been paid into this fund by petitioner. These statements by the Supreme Court of Ohio clearly refute any argument which respondent may assert to the effect that petitioner was a stranger to the proceedings of the Industrial Commission.

The Circuit Court of Appeals cited the case of *Affield* v. *The Paige Dairy,* 11 O. App. 122, in support of its decision. We submit that the question of estoppel was not in that case. There an employee was tricked and defrauded into signing an application for Workmen's Compensation. Upon learning what had been done, he attempted to withdraw his application for compensation, and thereafter he sought no relief nor accepted any of its benefits. The Commission refused to permit him to withdraw his application, and he then disregarded its refusal and sued his employer at common law. The latter asserted as a defense that the Commission had adjudicated that he was an employee of defendant and therefore could not prosecute the action.

The Court of Appeals held that under the allegations of the petition plaintiff's application for Workmen's Compensation was void and the Industrial Commission obtained no jurisdiction. There was no defense of estoppel asserted. The defense was simply that the Industrial Commission had obtained jurisdiction.

How different from the case at bar! The petitioner's defense of estoppel is not based upon the fact that the

Industrial Commission had jurisdiction to determine his claim. It makes no difference whether it did or did not have jurisdiction. This defense is based upon his own acts and conduct. Estoppel is not urged because be filed an application for Workmen's Compensation. It is asserted because he has continued to accept the benefits of that application, knowing all the while that he was receiving funds on the basis that he was an employee of this petitioner. He has taken his position—he cannot now take another.

In the *Conrad* case, *supra,* if the Commission had made an award to plaintiff and she had accepted it, that Commission would have, so far as her later claim for wrongful death at common law was concerned, acted solely without jurisdiction, but the Supreme Court of Ohio said that nevertheless she would be estopped from prosecuting such an action if she had accepted the benefits of the Commission's finding.

The foregoing Ohio cases, in our opinion, clearly govern the principle of estoppel which is applicable here, and in accordance with the pronouncement of this Court in the case of *Erie Railroad Co.* v. *Thompkins,* 304 U. S. 64, it was the duty of the Circuit Court of Appeals to follow the rule of law prescribed by the highest court in the State of Ohio. Petitioner's defense of estoppel is based upon undisputed facts. We respectfully urge that the Circuit Court was grossly in error in concluding that the issue of estoppel should have been submitted to the jury. Where the facts upon which estoppel is predicated are in dispute, the issue is obviously a jury question, but where, as here, there can be no dispute, no question for a jury is presented. The Supreme Court of Ohio has enunciated the principle of law applicable to the undisputed facts in this case. It, therefore, follows that it was the duty of the trial court to apply

such law to the facts, and the action of the Circuit Court should be reversed and that of the District Court affirmed.

Respectfully submitted,

A. M. HENDERSON,
Counsel for Petitioner.

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